

ALJ/RIM/jt2

PROPOSED DECISION

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Adjudicatory

3/22/2018 Item #17

Decision **PROPOSED DECISION OF ALJ MASON** (Mailed 2/20/2018)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of Quad Knopf, Inc. dba QK to
Adopt, Amend, or Repeal a Regulation
Pursuant to Public Utilities Code § 1708.5.

Petition 17-10-011

**DECISION DENYING PETITION OF QUAD KNOPF, DBA QK, TO ADOPT,
AMEND, OR REPEAL A REGULATION PURSUANT TO
PUBLIC UTILITIES CODE SECTION 1708.5**

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Appendix A – Pub. Util. Code §§ 8281-8286

DECISION DENYING PETITION OF QUAD KNOPF., DBA QK, TO ADOPT, AMEND, OR REPEAL A REGULATION PURSUANT TO PUBLIC UTILITIES CODE SECTION 1708.5

Summary

This Decision denies the *Petition of Quad Knopf Inc., DBA QK (Quad), to Adopt, Amend, or Repeal a Regulation Pursuant to Pub. Util. Code § 1708.5 (Petition)*. The Commission cannot repeal or refuse to enforce Pub. Util. Code § 8281 *et seq.* as it is obligated to follow the will of the Legislature unless instructed not to do so by a Court of higher jurisdictional authority. Since Quad has failed to cite to any authority, and the Commission has found no authority, declaring Pub. Util. Code § 8281 *et seq.* to be either unconstitutional or unenforceable, the Commission is bound, as a matter of law, to continue complying with Pub. Util. Code § 8281 *et seq.* Additionally, and by the same applicable law, the Commission cannot repeal General Order 156 (GO 156), as the Commission adopted GO 156 in order to implement the statutory scheme required under Pub. Util. Code § 8281 *et seq.* As long as Pub. Util. Code § 8281 *et seq.* remains legally viable, the Commission must continue to implement GO 156. Finally, standing alone, GO 156 does not violate the California Constitution's ban against preferential treatment in public contracting, found in Article I, Section 31.

1. Background

1.1. The Petition

Quad Knopf Inc., DBA QK (Quad) is a contractor that provides engineering, environmental planning, surveying, mapping, and biological

resource consulting to a number of California regulated public utilities.¹ Quad asserts that because it does not meet the workforce percentage threshold to be considered a diversity contractor established by Pub. Util. Code § 8282(a) and (d), it has been “forced” to give away an increasing percentage of its work to minority and women-owned businesses pursuant to General Order (GO) 156 and Pub. Util. Code § 8281 *et seq.*²

On October 11, 2017, Quad filed the instant *Petition* and, pursuant to Pub. Util. Code § 1708.5, asks the Commission to repeal GO 156; and to repeal or refuse to enforce Pub. Util. Code § 8281 *et seq.* on the grounds that they grant preferential treatment on the basis of race and gender in public contracting in violation of Proposition 209, codified in California Constitution Article I, Section 31(a).³ The operative text of Section 31(a) is as follows:

The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

On October 11, 2017, Quad served the *Petition* and filed a certificate of service.

To date, no interested person has filed a response to the *Petition*.

1.2. The History of Pub. Util. Code §§ 8281-8286

In 1986, the California Legislature passed the “Women and Minority Business Enterprises” law, effective January 1, 1987, and codified at Pub. Util.

¹ *Petition of Quad Knopf Inc., DBA QK (Quad), to Adopt, Amend, or Repeal a Regulation Pursuant to Pub. Util. Code § 1708.5* at 1.

² *Id.*, at 1-2; and Declaration of Michael D. Knopf, Quad President, ¶¶5 and 6.

³ *Id.*, at 13.

Code §§ 8281-8286, in order to promote greater inclusion of women and minorities in the utility procurement process.⁴ In 1990, the Legislature added disabled veteran business enterprises.⁵ After recognizing that the “essence of the American economic system of private enterprise is free, open, and transparent competition,”⁶ the Legislature made findings about the economic benefits of full and free participation of business enterprises owned by women, minority, and disabled veterans (sometimes referred to collectively as WMDVBEs) in utility procurement, an area where these businesses had previously received a low proportion of procurement awards.⁷ Among other interests, the Legislature declared that by encouraging expansion of the number of potential suppliers, competition grows and economic efficiencies result, to the benefit of ratepayers.⁸ In 2014, the Legislature added Lesbian, Gay, Bisexual, and Transgender (LGBT) business enterprises to the purview of Pub. Util. Code § 8281 *et seq.*⁹ Although Quad focuses its challenge to the promotion of women and minority business enterprises, it is clear that Pub. Util. Code § 8281 *et seq.* is much broader in scope, a fact that Quad only acknowledges in a footnote.¹⁰ (Sections 8281-8286 are reproduced in Appendix A.)

⁴ Assembly Bill (AB) 3678 (Moore), Stats. 1986, ch.1259.

⁵ Senate Bill (SB) 2398 (Dills), Stats. 1990, ch.516.

⁶ Pub. Util. Code § 8281(a).

⁷ Pub. Util. Code § 8281(b)(1)(C).

⁸ Pub. Util. Code § 8281(b)(1)(D),(E), and (F).

⁹ AB 1678 (Gordon), Stats. 2014, ch. 633.

¹⁰ *Petition* at 9, footnote 1.

Pub. Util. Code § 8281(b)(2) sets forth the purposes of this statutory scheme:

- Encourage greater economic opportunity for women, minority, disabled veteran, and LGBT business enterprises.¹¹
- Promote competition among regulated public utility suppliers in order to enhance economic efficiency in the procurement of electrical, gas, water, wireless telecommunications service provider, and telephone corporation contracts and contracts of their commission-regulated subsidiaries and affiliates.¹²
- Clarify and expand the program for the procurement by regulated public utilities of technology, equipment, supplies, services, materials, and construction work from women, minority, disabled veteran, and LGBT business enterprises.¹³

As such, electrical, gas, water, wireless telecommunications service providers, and telephone corporations with gross annual revenues exceeding \$25 million (utilities), or their reporting companies, are required to submit annual plans for increasing WMDV and LGBT business enterprises' participation in procurement, as well as annual reports on implementation of the plans.¹⁴

In furtherance of this stated policy of procurement inclusiveness, the Legislature authorized and directed the Commission to do, *inter alia*, the following:

¹¹ Pub. Util. Code § 8281(b)(2)(A).

¹² Pub. Util. Code § 8281(b)(2)(B).

¹³ Pub. Util. Code § 8281(b)(2)(C).

¹⁴ Pub. Util. Code § 8283(a).

- To require utilities to submit an annual, detailed, and verifiable plan for increasing procurement from women, minority, disabled veteran, and LGBT business enterprises.¹⁵
- To establish guidelines for utilities to use in establishing their own programs pursuant to this article.¹⁶
- To file an annual report with the Commission on the progress of activities undertaken by the utilities pursuant to this article.¹⁷

The Legislature also mandated that the utilities' annual plans include short-and long-term goals and timetables, but not quotas, as well as methods for encouraging women, minority, disabled veteran, and LGBT business enterprises to compete for subcontracts with them.¹⁸

1.3. The History of GO 156

In 1988, the Commission issued Decision (D.) 88-04-057,¹⁹ in which it adopted GO 156, subtitled "Rules Governing the Development of Programs to Increase Participation of Female and Minority Business Enterprises in Procurement of Contracts from Utilities As Required by Public Utilities Code Sections 8281-8285." In so doing, the Commission recognized that AB 3678 required it to (1) establish guidelines for use by utilities in establishing WMBE Programs; (2) develop and publish regulations setting forth criteria for verifying and determining the eligibility of WMBEs for procurement contracts; (3) develop

¹⁵ Pub. Util. Code § 8283(a).

¹⁶ Pub. Util. Code § 8283(c).

¹⁷ Pub. Util. Code § 8283(d).

¹⁸ Pub. Util. Code § 8283(b).

¹⁹ *In re Public Utilities Code Sections 8281 to 8285 Relating to Women and Minority Business Enterprises.*

and require utilities to implement an outreach program to inform and encourage WMBEs to apply for procurement contracts; and (4) provide annual reports to the Legislature on the utilities' progress in implementing WMBE programs.²⁰ GO 156 also includes "other groups" within its scope. (See § 1.3.13.) With this, the Commission made clear that GO 156 was not limited to the minorities specifically referred to in Pub. Util. Code § 8282(b). (1989 Cal. PUC LEXIS 861*6.)

Since 1988, the Commission has conducted several proceedings to consider and adopt modifications to GO 156 in 1998, 2003, 2005, 2006, 2011, and 2015.²¹ Some of these modifications expanded GO 156 to include disabled veteran and LGBT business enterprises in accordance with the direction from the California Legislature. In its current iteration, the subtitle and stated intent of GO 156 are quoted, respectively, as follows:

Rules Governing the Development of Programs to Increase Participation of Women, Minority, and Disabled Veteran and Lesbian, Gay, Bisexual and Transgender (LGBT) Business Enterprises in Procurement of Contracts from Utilities As Required by Public Utilities Code Sections 8281-8286.

....

These rules implement California Public Utilities Code Sections 8281-8286 which require the Commission to establish a procedure for the electrical, gas, water, wireless telecommunications

²⁰ 28 CPUC2d 36 at 40.

²¹ See *In re Rulemaking to Revise General Order 156* (1998) 83 Cal.P.U.C.2d 57; *In re Purpose of Amending General Order 156* (Cal. P.U.C., Nov. 30, 2003) Decision 03-11-024 [2003 WL 22785518]; *In re Purpose of Amending General Order 156* (Cal.P.U.C., Dec. 15, 2005) Decision 05-12-023 [2005 WL 3464984]; *In re Purpose of Amending General Order 156* (Cal.P.U.C., Aug. 24, 3006) D.06-08-031 [2006 WL 2516460]; *In re General Order 156* (Cal.P.U.C., 2011) 289 P.U.R.4th (West) 112; and *Decision Adopting the Amended General Order 156 with Amendments Necessary to Comply with Assembly Bill 1678 by Extending the Provisions of the Utilities' Supplier Diversity Program to Lesbian, Gay, Bisexual and/or Transgender (LGBT) Business Enterprises* (D.15-06-007).

service provider, and telephone corporation with gross annual revenues exceeding twenty-five million dollars (\$25,000,000) and their commission-regulated subsidiaries and affiliates to submit annual detailed and verifiable plans for increasing women-owned, minority-owned, disabled veteran-owned and LGBT-owned business enterprises' procurement in all categories.

We have set forth the full text of GO 156's subtitle and intent as Quad only focuses on a portion of the title and purpose of GO 156 as it relates to women and minorities.²² GO 156 is much broader in scope than what is set forth in Quad's *Petition*.

There are material aspects of GO 156 that distinguish it from the other governmental outreach programs that have been disfavored by the courts. Under GO 156, the utilities must set short-term (1-year), mid-term (3-year) and long-term (5-year) goals for the utilization of WMDVBE and LGBT business enterprises in procurement contracts.²³ These goals must be set annually for each major product and service category that provides opportunities for procurement,²⁴ and must demonstrate the utility's commitment to encourage the participation of WMDVBE and LGBT business enterprises in utility purchases and contracts.²⁵ While GO 156 uses the word "goal," it emphasizes that "goal" does not mean "quota":

²² *Petition* at 10-12.

²³ GO 156 § 8.

²⁴ GO 156 § 8.

²⁵ GO 156 § 8.

Goal means a target which, when achieved, indicates progress in a preferred direction. A goal is neither a requirement nor a quota.²⁶

Moreover, a utility is not penalized if its WMDVLGBTBE procurement participation goals are not met:

No penalty shall be imposed for failure of any utility to meet and/or exceed goals.²⁷

In fact, utilities retain the authority to use their legitimate business judgment in selecting suppliers:

Nothing in GO 156 authorizes or permits a utility to utilize set-asides, preferences, or quotas in administration of its WMDVLGBTBE program. The utility retains its authority to use its legitimate business judgment to select the supplier for a particular contract.²⁸

Finally, GO 156 contains provisions to assist non-WMDVLGBTBEs. First, non-WMDVLGBTBEs may benefit under GO 156's external outreach program. Section 6.2.1. , subpart (8), states:

Outreach activities may vary for each utility depending on its size, service territory, and specific lines of business. However each utility shall at a minimum:

....

(8) Offer the same assistance set forth in Section 6.2 to non-WMDVLGBTBEs, upon request.

²⁶ GO 156 § 1.3.16. *See, also*, 1990 Cal. PUC LEXIS 1287, *28 ["We remind the utilities that goals are just that – goals, and that if a utility cannot meet the goals it need only provide a reasonable explanation of its failure to do so. We emphasize that GO 156 does not create a set aside program for WMBEs, but simply opens the door for them to compete with established utility suppliers."]; and 1995 Cal. PUC LEXIS 958*11.

²⁷ GO 156 § 8.14.

²⁸ GO 156 § 6.

Second, Section 6.3.5, subpart (1), of the subcontracting program provides that the WMDVLGBTQ procurement programs may not be administered to the exclusion of qualified non-WMDVLGBTBEs:

It is the policy of the utility that business enterprises owned by women, minority, disabled veteran and LGBT person shall have the maximum practicable opportunity to participate in the performance of contracts. However, this policy shall not be used to exclude qualified non-WMDVLGBTBEs from participating in utility contracting.

The uniqueness of GO 156 was recognized in *PegaStaff v. Pacific Gas & Electric Company* (2015) 239 Cal.App.4th 1303, 1326-1327, a case not cited in the *Petition*. After recognizing that the Commission has the authority to regulate utility minority enterprise diversity programs, *PegaStaff* states:

PG&E's conduct, as alleged, could not have been necessary to comply with GO 156 because both GO 156 and PUC decisions make clear that utilities are not authorized or permitted to give preferential treatment to minority enterprises. In *Re Rulemaking to Revise General Order 156* (1998), 83 Cal.P.U.C.2d 57, the PUC stated: "In D.96-04-018, we proposed amendments to Section 6 of GO 156 in order to make absolutely clear, as we have stated in prior decisions, that our [minority enterprise diversity] program is an equal opportunity program, aimed at maximizing participation of [minority enterprises] in utility procurement contracting. It is not a set-aside program. These Proposed Amendments to Section 6 were aimed at reaffirming that utilities are not authorized or permitted to design their [minority enterprise diversity] programs utilizing set-asides, quotas, preferences, or preferential treatment." (*Id.* at 59, fn. omitted.) In that PUC decision, the initial paragraph of GO 156 section 6 was changed to the following, which remains the current language: "Each utility's [minority enterprise] program shall be designed to ensure that [minority enterprises] are encouraged to become potential suppliers of products and services to the utilities subject to GO 156. *Nothing in GO 156 authorizes or permits a utility to utilize set-asides, preferences, or quotas in administration of its [minority enterprise diversity] program. The utility retains its authority to use its*

legitimate business judgment to select the supplier for a particular contract.'" (83 Cal.P.U.C.2d at pp. 60, 68-69, italics added.)

The PUC could not have stated more explicitly that utilities are not permitted to achieve their GO 156 goals by use of preferences.

When viewed as a whole, GO 156 is a program unlike the ones that have previously run afoul of California Constitution I, Section 31. GO 156 encourages diversity within the utility procurement sector, does not demand that utilities establish quotas or contain fixed set-aside amounts, does not punish the utilities if they fail to meet their goals, and contains protections for non-WMDVLGBTBEs.

2. Discussion

2.1. Article III, Section 3.5, of the California Constitution Mandates that the Commission Cannot Repeal or Refuse to Follow a State Statute, such as Pub. Util. Code § 8281 et seq., unless a Court of Higher Jurisdictional Authority has Determined that Pub. Util. Code § 8281 et seq. is Unconstitutional or Unenforceable.

A second legal impediment to Quad's *Petition* that the Commission adopt, amend, or repeal a statutory scheme such as Pub. Util. Code §§ 8281 et seq. is found in another portion of the California Constitution. Pursuant to Article III, Section 3.5, which Quad's *Petition* does not cite or discuss, administrative agencies such as the Commission lack the power on their own to declare a statute unconstitutional or to refuse to enforce a statute:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

- (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
- (b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

In *Burlington Northern & Santa Fe Railway Company v. Public Utilities Commission* (2003) 112 Cal.App.4th 881, 887, the Court explained the scope of Article III, Section 3.5, as it relates to the Commission's authority to refuse to enforce a statute: "The constitutional provision only restricts the PUC's use of two sources as justification for refusing to enforce a statute: the state Constitution and federal law." In other words, until such time as a California appellate court weighs in on the constitutionality of a California statute, the Commission is bound to follow that statute in so far as it dictates how the Commission must regulate utilities that are subject to its jurisdiction.

As the interested person seeking a statutory repeal, Quad fails to meet its burden on this issue.²⁹ The *Petition* does not cite any California appellate law that has found that Pub. Util. Code § 8281 *et seq.* is either unconstitutional or unenforceable. In fact, with one exception which we will discuss in the following paragraph, none of the cases relied upon address Pub. Util. Code § 8281 *et seq.*, or a comparable statute that is as broadly worded to promote procurement diversity.³⁰ This glaring absence constitutes a fatal flaw in the *Petition* for which

²⁹ See *Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, 43 ["The complaining party bears the initial and ultimate burden of establishing unconstitutionality."]

³⁰ See *Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, [City of San Francisco's Board of Supervisors enacted a series of ordinances that originally set aside specified percentages of public contracting dollars for minority-owned business enterprises (MBE's) and women-owned business enterprises (WBE's), but later retained only bid discounts and other preferences for MBE's and WBE's]; *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000)

Footnote continued on next page

the Commission would be justified in rejecting it outright. But given the importance of the goals behind Pub. Util. Code § 8281 *et seq.*, as well as the Legislature's interest in receiving reports on the efforts to make the procurement process more inclusive,³¹ we will continue to address the remainder of the arguments that the *Petition* presents and explain why they are of no persuasive value.

The one decision that involved a challenge to Pub. Util. Code § 8281 *et seq.* that the *Petition* does cite is *Bras v. California Public Utilities Commission* (9th Cir. 1995) 59 F.3d 869, wherein a male architect brought a civil rights challenge against Pub. Util. Code § 8281 *et seq.* and GO 156. But the Court made it clear that it was only resolving the issue of whether plaintiff had standing to bring a challenge under the Equal Protection Clause of the United States Constitution:

24 Cal.4th 537, 562 [City of San Jose program that required contractors bidding on city projects to utilize a specified percentage of minority and women subcontractors or to document efforts to include minority and women subcontractors violated Article I, Section 31 of the California Constitution]; *C&C Construction, Inc. v. Sacramento Municipal Utility District* (2004) 122 Cal.App.4th 284, 291 [Sacramento Municipal Utility District's Equal Business Opportunity Plan gave price advantages and evaluation credits to minority-owned prime contractors and subcontractors]; and *Connerly, supra*, 92 Cal.App.4th at 28 [Then Governor Pete Wilson challenged the constitutionality of Government Code § 8880.56, applicable to the State Lottery Commission; Government Code §§ 16850 through 16857, applicable to the sale of state bonds; Government Code §§ 19790 through 19799, applicable to the state civil service; Education Code §§ 87100 through 87107, applicable to the California Community Colleges; and Public Contract Code §§ 10115 through 10115.15, applicable to state contracting]. Although the *Petition* does not cite it, *Monterey Mechanical Co. v. Wilson* (9th Cir.) 125 F.3d 702 also construed the Public Contract Code.

³¹ In *Connerly, supra*, 92 Cal.App.4th at 62-63, the Court observed: "The Legislature's right to obtain accurate and up-to-date information on matters of public concern cannot be disputed....The broad nature of the power of inquiry and the importance thereof have been recognized under state law. In many instances, in order to the preparation of wise and timely laws the necessity of investigation of some sort must exist as an indispensable incident and auxiliary to the properly exercise of legislative power."

We express no opinion as to whether the Code or Order discriminates against Bras on the basis of race or gender. All we hold is that he has standing to raise the claims.³²

The other portion from *Bras* that the *Petition* cites³³ regarding the possible discriminatory impact of Pub. Util. Code § 8281 *et seq.* and GO 156 is mere *dicta* (*i.e.* the discussion or determination of a point not necessary to the disposition of the legal question at issue) and, therefore, has no binding authority on another court.³⁴

Before leaving this section, we must recognize that when *Burlington* interpreted Article III., Section 3.5, it found an exception that an administrative agency could rely on to refuse to enforce a statute. Where there are two facially inconsistent statutes, Article III., Section 3.5, does not prohibit an administrative agency, such as the Commission, from refusing to enforce one or both statutes. Instead, the Commission has the duty to consider both inconsistent statutes and decide which one to enforce. (112 Cal.App.4th at 888.)

But the *Petition* does not assert any facts to fit within this exception. Quad does not point to two inconsistent California statutes concerning outreach to WMDVBE and/or LGBT business enterprises. Instead, Quad's argument is that Pub. Util. Code § 8281 *et seq.* and GO 156 violate Proposition 209, codified into California's Constitution in Article I, Section 31.³⁵ As such, the limited exception created by *Burlington* is not applicable here.

³² 59 F.3d at 875.

³³ *Petition* at 13.

³⁴ See *People v. Evans* (2008) 44 Cal.4th 590, 599.

³⁵ *Petition* at 2.

**2.2. The Commission Must Continue to Enforce
GO 156 in order to Comply with Pub. Util.
Code § 8281 *et seq.***

As we explained, *supra*, GO 156 was not created in a decisional vacuum. Instead, it was adopted in response to the California Legislature's directive in Pub. Util. Code § 8281 *et seq.*, that the Commission establish guidelines for utilities to use in establishing programs to increase utility procurement from WMDVLGBTBEs. The Commission is obligated to follow the will of the Legislature until such time that an appellate court has determined that Pub. Util. Code § 8281 *et seq.* is either unconstitutional or unenforceable. As that determination has not occurred, the Commission is bound to continue enforcing GO 156.

**2.2.1. GO 156 Does Not Violate California
Constitution Article I., Section 31, as it is a
Utility Contracting Program, not a Public
Contracting Program**

A review of Article I, Section 31, makes it inapplicable to the parameters of GO 156 in one fundamental way – GO 156 is not a public contracting program. Article I, Section 31, along with its predecessor Proposition 209, provide that “the State shall not discriminate against, or grant preferential treat to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in...public contracting.” Article I, Section 31, subdivision (f) defines “State” to include, but is not limited to, “the State itself, any city county, city and county, pubic university system, including special district, or any other political subdivision or governmental instrumentality of or within the State.” Thus, for Quad to successfully invoke Article I. Section 31, it must first demonstrate that the “State” is a party to a “public contract.”

Quad fails to meet that burden for two reasons. First, while the Commission fits within the definition of the word “State,” no state entity is party to any contract executed pursuant to GO 156. Second, the challenged contracts are not “public contracts.” GO 156 applies to “all electrical, gas, water, wireless telecommunications service providers, and telephone corporations with gross annual revenues exceeding \$25,000,000. ” As such, the contracts are entered into by the utilities that are subject to the Commission’s jurisdiction, making them public utility contracts. By definition, the Commission does not fit within the definition of a public utility.³⁶ Accordingly, the contracts are utility contracts, rather than public contracts.

Quad also fails to set forth any facts that could conceivably transform a utility contract into a public contract subject to Article I, Section 31. The *Petition* does not allege that the utilities subject to GO 156 are employed by the Commission.³⁷ Nor does the *Petition* allege any state action theories. For example, there are no allegations that the State has profited from a private entity’s discriminatory conduct, as opposed to the entity’s overall operations.³⁸ Additionally, there are no allegations that the public utilities (which are in fact privately owned entities that the Commission regulates)³⁹ are so entwined with the Commission in such a way as to convert the public utilities into state actors.⁴⁰

³⁶ See, e.g., Pub. Util. Code §§ 216, 767.5(a), 787(c)(3), and 1821(d).

³⁷ See, e.g. *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 301 [Sheppard alleged direct employment by a political subdivision of the state].

³⁸ See, e.g., *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715.

³⁹ In *PegaStaff, supra*, 239 Cal.App.4th at 1311, the Court states that the Commission “is an agency created by the California Constitution to regulate privately owned public utilities such

Footnote continued on next page

There was, however, one instance, in *Gay Law Students Association v. Pacific Telephone & Telegraph* (1979) 24 Cal.3d 458, 469, wherein the Court, without discussing the implications of Article XII, Section 3's statement that regulated utilities are private corporations, considered a public utility to be akin to a governmental entity. At best this would mean, as the Court found, that "a public utility bears a constitutional obligation to avoid arbitrary employment discrimination." (24 Cal.3d at 472.) Yet, likening private utilities to government entities would not allow the *Petition* to go forward, since the Court in *PegaStaff* recognized that GO 156 does not permit the use of racial preferences to meet the procurement diversity goals.

2.2.2. GO 156 does not Discriminate Against non-WMDVLGBTBEs, nor grant preferential treatment in favor of WMDVLGBTBEs

Even if Quad could get past the initial legal threshold and establish that a contract executed under GO 156 could be deemed a public contract, the fact remains that GO 156 does not discriminate against non-WMDVLGBTBEs, or

as PG&E." *PegaStaff's* position is derived from California Constitution, Article XII, Section 3, which states:

Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.

⁴⁰ See, e.g. *Brentwood Academy v. Tennessee Secondary School Athletic Association* (2001) 531 U.S. 288, 300 [organizational entwinement, i.e., structural overlap between the private entity and public entity, must be present].

grant preferential treatment in favor of WMDVLGBTBEs. As set forth, *supra*, in Section 1.3.,

- GO 156 sets goals, not quotas;
- Go 156 does not penalize utilities if the goals are not met;
- GO 156 allows the utilities to use their legitimate business judgment in selecting suppliers; and
- GO 156 contains provisions both to assist non-WMDVLGBTBEs, and to protect non-WMDVLGBTBEs from discrimination in the procurement contracting process.

The parameters and protections provided in GO 156 are much different than the programs that have been disfavored in prior decisions.⁴¹ From its inception, the Commission has made it clear that GO 156 did not permit the use of race or ethnicity as the sole criteria to determine who may be considered for a contract.⁴²

Quad's *Petition* should be denied.

3. Need for Hearing

As this involves a legal issue only, hearings are not necessary.

4. Comments on Proposed Decision

The proposed decision of Administrative Law Judge (ALJ) Mason in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Quad served its comments on March 9, 2018. Quad asks that a correction be made and that the Commission acknowledge that

⁴¹ See cases cited and discussed, *supra*, at footnote 35.

⁴² D.90-10-032; 38 CPUC 2nd 5.

Quad is making a facial challenge, rather than an as-applied challenge, to GO 156 and Pub. Util. Code § 8281, *et seq.*

In response to the comments, we have made one non-substantive edit to the decision. Yet we decline to follow Quad's request that we characterize the nature of its legal challenge to GO 156 and Pub. Util. Code § 8281, *et seq.*

5. Assignment of Proceeding

Michael Picker is the assigned Commissioner and Robert M. Mason III is the assigned ALJ in this proceeding.

Findings of Fact

1. Quad is a contractor that provides engineering, environmental planning, surveying, mapping, and biological resource consulting to a number of California regulated public utilities.

2. Quad asserts that because it does not meet the workforce percentage threshold to be considered a diversity contractor established by Pub. Util. Code § 8282(a) and (b), it has been "forced" to give away an increasing percentage of its work to minority and women-owned businesses pursuant to GO 156 and Pub. Util. Code § 8281 *et seq.*

3. On October 11, 2017, Quad filed the instant *Petition* and, pursuant to Pub. Util. Code § 1708.5, asks the Commission to repeal GO 156; and to repeal or refuse to enforce Pub. Util. Code § 8281 *et seq.* on the grounds that they grant preferential treatment on the basis of race and gender in public contracting in violation of Proposition 209, later codified in California Constitution Article I, Section 31(a).

4. In 1986, the California Legislature passed the "Women and Minority Business Enterprises" law, effective January 1, 1987, and codified at Pub. Util.

Code §§8281-8286, in order to promote greater inclusion of women and minorities in the utility procurement process.

5. In 1990, the Legislature added disabled veteran business enterprises to Pub. Util. Code §§8281-8286.

6. In 2014, the Legislature added LGBT business enterprises to the purview of Pub. Util. Code § 8281 *et seq.*

7. The Legislature authorized and directed the Commission to do, *inter alia*, the following:

- To require utilities to submit an annual, detailed, and verifiable plan for increasing procurement from women, minority, disabled veteran, and LGBT business enterprises.
- To establish guidelines for utilities to use in establishing their own programs pursuant to this article.
- To file an annual report with the Commission on the progress of activities undertaken by the utilities pursuant to this article.

8. The Legislature also mandated that the utilities' annual plans include short-and long-term goals and timetables, but not quotas, as well as methods for encouraging women, minority, disabled veteran, and LGBT business enterprises to compete for subcontracts with them.

9. In 1988, the Commission issued D.88-04-057, in which it adopted GO 156, subtitled "Rules Governing the Development of Programs to Increase Participation of Female and Minority Business Enterprises in Procurement of Contracts from Utilities As Required by Public Utilities Code Sections 8281-8285."

10. Under GO 156, the utilities must set short-term (1-year), mid-term (3-year) and long-term (5-year) goals for the utilization of WMDVBE and LGBT business enterprises in procurement contracts.

11. While GO 156 uses the word “goal,” it emphasizes that “goal” does not mean “quota.”

12. Under GO 156, a utility is not penalized if its WMDVLGBTBE procurement participation goals are not met.

13. Under GO 156, utilities retain the authority to use their legitimate business judgment in selecting suppliers.

14. GO 156 contains provisions to assist non-WMDVLGBTBEs. Non-WMDVLGBTBEs may benefit under GO 156’s external outreach program.

15. GO 156 provides that the WMDVLGBTQ procurement programs may not be administered to the exclusion of qualified non-WMDVLGBTBEs.

Conclusions of Law

1. GO 156 does not involve public contracts.
2. GO 156 does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in public contracting.
3. The Commission administers GO 156 in accordance with Pub. Util. Code §§ 8281 *et seq.*
4. Article III, Section 3.5, of the California Constitution requires that the Commission not repeal or refuse to follow Pub. Util. Code §§ 8281 *et seq.* unless a court of higher jurisdictional authority determines that Pub. Util. Code §§ 8281 *et seq.* is unconstitutional or unenforceable.
5. No appellate authority has determined that Pub. Util. Code §§ 8281 *et seq.* is unconstitutional or unenforceable.
6. Quad’s *Petition* should be denied as it has failed to cite any law or facts that would justify its claims for relief.

O R D E R

IT IS ORDERED that:

1. The *Petition of Quad Knopf Inc., DBA QK, to Adopt, Amend, or Repeal a Regulation Pursuant to Pub. Util. Code § 1708.5* is denied.
2. Petition 17-10-011 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Appendix A

2014 California Code Public Utilities Code – PUC DIVISION 4 - LAWS RELATING TO UTILITY CORPORATIONS AND THEIR EMPLOYEES CHAPTER 7 - Miscellaneous Regulations ARTICLE 5 - Women, Minority, Disabled Veteran, and LGBT Business Enterprises

**DIVISION 4. LAWS RELATING TO UTILITY CORPORATIONS AND THEIR
EMPLOYEES [7503 - 8286] (*Division 4 enacted by Stats. 1951, Ch. 764.*)
CHAPTER 7. Miscellaneous Regulations [8201 - 8286] (*Chapter 7 enacted by
Stats. 1951, Ch. 764.*) ARTICLE 5. Women, Minority, Disabled Veteran, and LGBT
Business Enterprises [8281 - 8286] (*Heading of Article 5 amended by Stats. 2014,
Ch. 633, Sec. 1.*)**

§ 8281

Universal Citation: [CA Pub Util Code § 8281 \(2014\)](#)

(a) The Legislature hereby finds and declares that the essence of the American economic system of private enterprise is free, open, and transparent competition. Only through free, open, and transparent competition can free markets, reasonable and just prices, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be ensured. The preservation and expansion of that competition are basic to the economic well-being of this state and that well-being cannot be realized unless the actual and potential capacity of women, minority, disabled veteran, and LGBT business enterprises is encouraged and developed. Therefore, it is the declared policy of the state to aid the interests of women, minority, disabled veteran, and LGBT business enterprises in order to preserve reasonable and just prices and a free competitive enterprise, to ensure that a fair proportion of the total purchases and contracts or subcontracts for commodities, supplies, technology, property, and services for regulated public utilities, including, but not limited to, renewable energy, wireless telecommunications, broadband, smart grid, and rail projects, are awarded to women, minority, disabled veteran, and LGBT business enterprises, and to maintain and strengthen the overall economy of the state.

(b) (1) The Legislature finds all of the following:

(A) The opportunity for full participation in our free enterprise system by women, minority, disabled veteran, and LGBT business enterprises is essential if this state is to attain social and economic equality for those businesses and improve the functioning of the state economy.

(B) Public agencies and some regulated utilities that have established short- and long-range women, minority, disabled veteran, and LGBT business enterprise goals are awarding 30 percent or more of their contracts to these business enterprises.

(C) Women, minority, disabled veteran, and LGBT business enterprises have traditionally received less than a proportionate share of regulated public utility procurement contracts, especially in renewable energy, wireless telecommunications, broadband, smart grid, and rail projects.

(D) It is in the state's interest to expeditiously improve the economically disadvantaged position of women, minority, disabled veteran, and LGBT business enterprises.

(E) The position of these businesses can be substantially improved by providing long-range substantial goals for procurement by regulated public utilities of technology, equipment, supplies, services, materials, and construction work, especially in renewable energy, wireless telecommunications, broadband, smart grid, and rail projects, from women, minority, disabled veteran, and LGBT businesses.

(F) That procurement also benefits the regulated public utilities and consumers of the state by encouraging the expansion of the number of suppliers for procurements, thereby encouraging competition among the suppliers and promoting economic efficiency in the process.

(G) That the long-term economic viability of this state depends substantially upon the ability of renewable energy, wireless telecommunications, broadband, smart grid, and rail projects to incorporate women, minority, disabled veteran, and LGBT businesses into those projects.

(2) It is the purpose of this article to do all of the following:

(A) Encourage greater economic opportunity for women, minority, disabled veteran, and LGBT business enterprises.

(B) Promote competition among regulated public utility suppliers in order to enhance economic efficiency in the procurement of electrical, gas, water, wireless telecommunications service provider, and telephone corporation contracts and contracts of their commission-regulated subsidiaries and affiliates.

(C) Clarify and expand the program for the procurement by regulated public utilities of technology, equipment, supplies, services, materials, and construction work from women, minority, disabled veteran, and LGBT business enterprises.

(Amended by Stats. 2014, Ch. 633, Sec. 2. Effective January 1, 2015.)

§ 8282

Universal Citation: [CA Pub Util Code § 8282 \(2014\)](#)

For the purposes of this article, the following definitions apply:

(a) “Women business enterprise” means a business enterprise that is at least 51 percent owned by a woman or women; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more of those individuals.

(b) “Minority business enterprise” means a business enterprise that is at least 51 percent owned by a minority group or groups; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more minority groups, and whose management and daily business operations are controlled by one or more of those individuals. The contracting utility shall presume that minority includes African Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans.

(c) “Disabled veteran business enterprise” has the same meaning as defined in Section 999 of the Military and Veterans Code.

(d) “LGBT business enterprise” means a business enterprise that is at least 51 percent owned by a lesbian, gay, bisexual, or transgender person or persons; or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more lesbian, gay, bisexual, or transgender persons; and whose management and daily business operations are controlled by one or more of those individuals.

(e) “Control” means exercising the power to make policy decisions.

(f) To “operate” means to be actively involved in the day-to-day management. It is not enough to merely be an officer or director.

(g) “Renewable energy project” means a project for the development and operation of an eligible renewable energy resource meeting the requirements of the California Renewables Portfolio Standard Program (Article 16 (commencing with Section 399.11) of Chapter 2.3 of Part 1 of Division 1).

(Amended by Stats. 2014, Ch. 633, Sec. 3.5. Effective January 1, 2015.)

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§ 8283

Universal Citation: [CA Pub Util Code § 8283 \(2014\)](#)

(a) The commission shall require each electrical, gas, water, wireless telecommunications service provider, and telephone corporation with gross annual revenues exceeding twenty-five million dollars (\$25,000,000) and their commission-regulated subsidiaries and affiliates, to submit annually, a detailed and verifiable plan for increasing procurement from women, minority, disabled veteran, and LGBT business enterprises in all categories, including, but not limited to, renewable energy, wireless telecommunications, broadband, smart grid, and rail projects.

(b) These annual plans shall include short- and long-term goals and timetables, but not quotas, and shall include methods for encouraging both prime contractors and grantees to engage women, minority, disabled veteran, and LGBT business enterprises in subcontracts in all categories that provide subcontracting opportunities, including, but not limited to, renewable energy, wireless telecommunications, broadband, smart grid, and rail projects.

(c) The commission shall establish guidelines for all electrical, gas, water, wireless telecommunications service providers, and telephone corporations with gross annual revenues exceeding twenty-five million dollars (\$25,000,000) and their commission-regulated subsidiaries and affiliates, to be utilized in establishing programs pursuant to this article.

(d) Every electrical, gas, water, wireless telecommunications service provider, and telephone corporation with gross annual revenues exceeding twenty-five million dollars (\$25,000,000) shall furnish an annual report to the commission regarding the implementation of programs established pursuant to this article in a form that the commission shall require, and at the time that the commission shall annually designate. The report shall include the information about LGBT business enterprises beginning with the 2016 report.

(e) (1) The commission shall provide a report to the Legislature on September 1 of each year, on the progress of activities undertaken by each electrical, gas, water, wireless telecommunications service provider, and telephone corporation with gross annual revenues exceeding twenty-five million dollars (\$25,000,000) pursuant to this article in the implementation of women, minority, disabled veteran, and LGBT business

enterprise development programs. The report shall include information about which procurements are made with women, minority, disabled veteran, and LGBT business enterprises with at least a majority of the enterprise's workforce in California, to the extent that information is readily accessible. The commission shall recommend a program for carrying out the policy declared in this article, together with recommendations for legislation that it deems necessary or desirable to further that policy. The commission shall make the report available on its Internet Web site.

(2) In regard to disabled veteran business enterprises, the commission shall ensure that the programs and legislation recommended pursuant to paragraph (1) are consistent with the disabled veteran business enterprise certification eligibility requirements imposed by the Department of General Services and that the recommendations include only those disabled veteran business enterprises certified by the Department of General Services.

(3) The commission shall include the information about LGBT business enterprises required by paragraph (1) beginning with the report due on September 1, 2016.

(f) (1) The Legislature declares that each electrical, gas, water, mobile telephony service provider, and telephone corporation that is not required to submit a plan pursuant to subdivision (a) is encouraged to voluntarily adopt a plan for increasing women, minority, disabled veteran, and LGBT business enterprise procurement in all categories.

(2) The Legislature declares that each cable television corporation and direct broadcast satellite provider is encouraged to voluntarily adopt a plan for increasing women, minority, disabled veteran, and LGBT business enterprise procurement and to voluntarily report activity in this area to the Legislature on an annual basis.

(Amended by Stats. 2014, Ch. 633, Sec. 4. Effective January 1, 2015.)

§ 8284

Universal Citation: [CA Pub Util Code § 8284 \(2014\)](#)

(a) (1) The commission shall, by rule or order, adopt criteria for verifying and determining the eligibility of women, minority, and LGBT business enterprises for procurement contracts.

(2) The commission shall adopt the Department of General Services' disabled veteran business enterprise certification eligibility requirements for verifying and determining the eligibility of disabled veteran business enterprises for procurement contracts, and shall not deem eligible those disabled veteran business enterprises that are not certified by the Department of General Services.

(3) In initially adopting criteria for verifying and determining the eligibility of LGBT business enterprises for procurement contracts pursuant to paragraph (1), the commission shall adopt the LGBT status qualifiers created by the National Gay and Lesbian Chamber of Commerce. The commission may update these LGBT status qualifiers as appropriate.

(b) The commission shall develop, and require every electrical, gas, water, wireless telecommunications service provider, and telephone corporation with gross annual revenues exceeding twenty-five million dollars (\$25,000,000) and their commission-regulated subsidiaries and affiliates to implement, an outreach program to inform and recruit women, minority, disabled veteran, and LGBT business enterprises to apply for procurement contracts under this article.

(Amended by Stats. 2014, Ch. 633, Sec. 5. Effective January 1, 2015.)

§ 8285

Universal Citation: [CA Pub Util Code § 8285 \(2014\)](#)

(a) Any person or corporation, through its directors, officers, or agents, which falsely represents a business as a women, minority, or LGBT business enterprise in the procurement of, or the attempt to procure, contracts from an electrical, gas, water, wireless telecommunications service provider, or telephone corporation with gross annual revenues exceeding twenty-five million dollars (\$25,000,000), or a commission-regulated subsidiary or affiliate subject to this article, shall be punished by a fine of not more than five thousand dollars (\$5,000), by imprisonment in a county jail for not more than one year or in the state prison, or by both that fine and imprisonment. In the case of a corporation, the fine or imprisonment, or both, shall be imposed on every director, officer, or agent responsible for the false statements.

(b) Any person or corporation, through its directors, officers, or agents, which falsely represents a business as a disabled veteran business enterprise in the procurement of, or the attempt to procure, contracts from an electrical, gas, water, wireless telecommunications service provider, or telephone corporation with gross annual revenues exceeding twenty-five million dollars (\$25,000,000), or a commission-regulated subsidiary or affiliate subject to this article, shall be punished according to the penalties established pursuant to subdivision (b) of Section 999.9 of the Military and Veterans Code. In the case of a corporation, the fine or imprisonment, or both, shall be imposed on every director, officer, or agent responsible for the false statements.

(Amended by Stats. 2014, Ch. 633, Sec. 6. Effective January 1, 2015.)

§ 8286

Universal Citation: [CA Pub Util Code § 8286 \(2014\)](#)

(a) In order to facilitate the participation of women-owned businesses, minority-owned businesses, disabled veteran-owned businesses, and LGBT-owned businesses and small businesses in contract procurement, any corporation subject to this article may consider the following measures to include those businesses in all phases of their contracting:

(1) Timely or progressive payments to those businesses.

(2) An amendment of the performance bond requirements so that bond requirements of electrical, gas, and telephone corporations do not prohibitively burden those businesses from procuring the corporation's business.

(3) The provision of assistance to those businesses by securing contract payments to those businesses with letters of credit, negotiable securities, or other financing arrangements or measures.

(b) This section does not restrict a corporation's ability to require a bond.

(Amended by Stats. 2014, Ch. 633, Sec. 7. Effective January 1, 2015.)

(End of Appendix A)